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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO MORENO, Jr.,

Defendant and Appellant.

D055151

(Super. Ct. No. FVA027501)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Dwight W. Moore, Judge. Affirmed as modified and remanded with directions.

A jury convicted Sergio Moreno, Jr. of first degree murder (Pen. Code, § 187, subd. (a), count 1);¹ attempted willful, deliberate, premeditated murder (§§ 664, subd. (a); 187, subd. (a), counts 2 and 3); and shooting at an occupied motor vehicle (§ 246, count 4.) As to all counts, the jury found true that he personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d));

¹ All further statutory references are to the Penal Code unless otherwise stated.

personally used a firearm (§ 12022.53, subd (b)); and was a principal who personally used and discharged a firearm causing death or great bodily injury (§ 12022.53, subd. (e)(1)).²

On the sentencing information section of the minutes dated December 3, 2008, the trial court sentenced Moreno to 95 years to life plus two life terms as follows: as to count 1, it imposed a 25 years-to-life term with a consecutive 25 years-to-life term for the section 12022.53, subdivision (d) enhancement; as to count 2, it imposed a consecutive life with possibility for parole term with a consecutive 25 years-to-life term for the section 12022.53, subdivision (d) enhancement; as to count 3, it imposed a consecutive life with possibility for parole term with a consecutive 20 years for the section 12022.53, subdivision (c) enhancement; and the count 4 sentence of 5 years was stayed under section 654.³

On appeal, Moreno relies on *Missouri v. Seibert* (2004) 542 U.S. 600, 604 (*Seibert*) to contend that police engaged in a deliberate two-part interview in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Accordingly, he contends the trial court erroneously declined his motion to suppress his incriminating statements.

² Moreno was tried with his codefendant, Salvador Gonzales, but before trial was concluded, Gonzales pleaded guilty to voluntary manslaughter and admitted the truth of a firearm enhancement.

³ As the People point out, a section of the sentencing minutes states that Moreno was sentenced to 95 years to life. Further, the total of 843 days presentence custody credits is impermissibly recorded once each on the determinate and indeterminate abstracts of judgment. (§2900.5, subd. (b); *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414-1415.) Accordingly, the abstract of judgment must be amended to accurately reflect the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On August 14, 2006, Heather Marie Montoya, a passenger in a car driven by Paul Martinez, was fatally shot in Fontana, California. Martinez was shot and hospitalized. That afternoon, Fontana Police Department Detective Robert Moritz interviewed Moreno, codefendant Gonzales and Jacque Long, another passenger in the car from which the shots were fired. After Moreno was charged with Montoya's murder, he moved to exclude his pre-*Miranda*-warning and post-*Miranda*-warning statements.

Evidence at the suppression hearing consisted primarily of Detective Moritz's testimony and the transcribed interviews. The relevant facts are as follows: The day of the shooting, Detective Moritz went to Moreno's house and asked him to go to the police station to speak about the incident. Detective Moritz did not recall his exact statements to Moreno, but he most likely told him he was not under arrest, and that although he was handcuffed en route to the police station, it was for the detective's safety because his police car did not have a cage to separate him from back seat passengers. They reached the police station approximately 15 to 20 minutes later. Detective Moritz removed the handcuffs and interviewed Moreno without giving *Miranda* warnings. Detective Moritz asked questions for identification purposes and repeated that the interview was voluntary

and Moreno was not under arrest. Moreno responded that he understood.⁴

Detective Moritz then asked Moreno about the shooting incident. Moreno denied he was the shooter and instead repeatedly inculpated his codefendant, who he claimed had gotten angry because someone had thrown shaving cream on the codefendant's home. After several minutes, Detective Moritz asked Moreno if he was willing to take a lie detector test. Moreno for the first time said he needed to pick up his mother from work. Detective Moritz replied, "[A]lright I realize that you have the responsibility to pick up your mother but we kind of have a bigger issue at stake. Namely you were in a car w[h]ere a murder occurred." Detective Moritz added, "Okay, so unfortunately you know

⁴ Moreno acknowledged the voluntariness of the interview in this exchange:

[Detective Moritz]: Okay, Um the reason you're here number one is, uh, you're not under arrest, okay? So you are able to leave any time you want. I appreciate you coming in. You're here obviously because you came forward and told my partners over there that you were in the car with Salvador when he shot that guy this morning. Okay? So we're here to talk about that now.

Moreno: [H]mm[.]

[Detective Moritz]: Do you understand? Is all that clear to you?

Moreno: Yes, sir[.]

[Detective Moritz]: Do you have any questions about that or anything?

Moreno: No sir.

[Detective Moritz]: Okay. I want you to know that I appreciate you coming forward and working with me and staying cooperative and talking with me. Do you understand?

Moreno: Yes sir.

[Detective Moritz]: Um[,] so we're clear[,] you're not under arrest.

Moreno: Okay.

[Detective Moritz]: Okay. I appreciate you coming here and talking with us and I know you agreed to talk with me.

Moreno: Okay[.]

sometimes our schedule has to work around certain things." Detective Moritz continued the questioning, particularly about the whereabouts of the murder weapon, and Moreno readily answered the questions. Eventually, Moreno asked, "If I let you know where the gun's at, can I at least go home?" Detective Moritz replied, "I can't make you a promise that I don't know that I could keep. You wouldn't want me to lie to you right? Okay? I don't know. I can't make you that promise." Shortly afterwards, Moreno admitted he had thrown the gun in a dumpster. At that point, Detective Moritz ended the first interview, which had lasted approximately 90 minutes.

Detective Moritz went to get the murder weapon and also interviewed Gonzales and Long. In the meantime, Moreno stayed at the police station in a different unlocked interview room that was about 30 feet away, but he was not placed under arrest. Six hours later, Detective Moritz interviewed Moreno a second time at the police station.

At the start of the second interview, Moreno asked a question about a gunshot residue test. Detective Moritz answered it, gave *Miranda* warnings and confirmed that Moreno understood his rights. Moreno waived his rights and asked if the warnings meant he was being placed under arrest. Detective Moritz responded, "[W]ell let's not put the cart before the horse here, ok" and proceeded to inquire further about the shooting incident. Moreno initially reiterated that he was not the shooter, but eventually admitted that he, and not codefendant Gonzales, had fired five or six shots at the car.

Detective Moritz testified that he did not deliberately engage in a two-interview strategy. Rather, as the first interview progressed, he considered Moreno merely as a witness and not the murder suspect.

After hearing argument on both sides, the trial court found no *Miranda* violation. The court found that Moreno was not in custody during the first interview and therefore *Miranda* did not apply. Further, although Moreno had stated that he needed to pick up his mother, he never made any effort to leave and there was no showing that Detective Moritz detained him. Rather, Detective Moritz kept talking and Moreno responded; therefore, the subsequent statements were not obtained in violation of *Miranda*. The second interview started with *Miranda* warnings, which Moreno waived; therefore, those statements were admissible and the court declined to suppress them. The jury watched an edited version of the video-recorded second interview.

DISCUSSION

I. *Moreno Was Not in Custody During the First Interview*

Moreno contends the first interview was custodial because police transported him in handcuffs to the police station where the questioning occurred, they dominated the assertedly confrontational questioning, and they did not stop questioning him when he had said he needed to pick up his mother. He maintains *Miranda* warnings were thus required at the start of the first interview.

A person interrogated by law enforcement officers after being taken into custody must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda, supra*, 384 U.S. 436.) Statements taken in violation of this rule are generally inadmissible. (*Stansbury v. California* (1994) 511 U.S. 318, 322.)

The pivotal determination is whether a reasonable person in appellant's position would have felt he was in custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) The test for whether a defendant was in custody has been described as whether a reasonable person in that position would "have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) "An accused is in custody when, even 'in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.' " (*U.S. v. Kirsh* (2d Cir. 1995) 54 F.3d 1062, 1067.) Indicia of custody for *Miranda* purposes include: whether the suspect was formally arrested, what was communicated to the suspect about his detention, the length of the detention, the location, the ratio of officers to suspects, and the demeanor and nature of the officer's questioning. (See *People v. Lopez* (1985) 163 Cal.App.3d 602, 608.)

"Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.)

It is the trial court's responsibility to resolve disputed facts about the circumstances surrounding the challenged statement and then determine whether the protections of *Miranda's* admonitions were required. On appeal, this court must accept the trial court's resolution of disputed facts, including the credibility of witnesses, as long as that resolution is supported by substantial evidence. " 'Considering those facts, as found,

together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda's* rules.' " (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

Like the trial court, we conclude that Moreno was not in custody during the first interview. Detective Moritz testified he had explained to Moreno that his car did not have a cage and therefore he handcuffed all suspects for his own safety. The ride to the police station lasted approximately 20 minutes. There, the handcuffs were removed. Moreno stated he understood he was not under arrest. Detective Moritz conducted the interview alone. His questions were consistent with an investigatory interview, and there is no indication he was hostile or impermissibly confrontational. During the interview, after Moreno said he needed to pick up his mother, there is no indication Moreno made any move to leave, or that he was detained from leaving.

Under the totality of the circumstances, the exchange between Detective Moritz and Moreno resulted from Moreno's temporary detention based on an ongoing police investigation, and not from a formal arrest. In any event, even if the first interview was conducted in violation of *Miranda*, the remedy was to exclude those statements from trial, a measure that the trial court took in this case. It admitted only a redacted portion of the second interview.

II. *The Police Did not Use an Impermissible Two-Stage Interview Strategy*

Moreno contends Detective Moritz engaged in a deliberate two-step questioning strategy based on the same police officer's interviews that were conducted at the same place. During the six-hour break that separated the interviews, Moreno stayed at the

police station. He asserts that during the break, "nothing of substance occurred." We conclude that Moreno's confession, which was voluntary and occurred after *Miranda* warnings were given, was admissible.

The United States Supreme Court addressed this issue in *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*). In *Elstad*, police officers went to the defendant's home and questioned him about a burglary without first reading him the *Miranda* warnings. (*Id.*, at p. 301.) After he admitted being present at the burglary, the officers took him to the police station. One hour later, the officers informed him of his *Miranda* rights. He waived those rights and gave a full statement detailing his role in the crime. (*Elstad*, *supra*, at pp. 301-302.) The Court held that "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (*Elstad*, at p. 309.) "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement," the Court found that "subsequent administration of *Miranda* warnings . . . ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." (*Elstad*, at p. 314.) "The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne." (*United States v. Rith* (10th Cir. 1999) 164 F.3d 1323, 1333.)

This issue was revisited in *Seibert*, *supra*, 542 U.S. 600. Unlike *Elstad*, where "the officer's initial failure to warn was an 'oversight,'" (*Elstad*, 470 U.S. at pp. 315-316), in *Seibert* the police "used a two-step questioning technique based on a deliberate

violation of *Miranda*." (*Seibert, supra*, at p. 620 (conc. opn. of Kennedy, J.)) The interview strategy was based on "a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of [*Miranda*], the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time." (*Seibert, supra*, at p. 604.)

In *Seibert*, a plurality of the United States Supreme Court reasoned: "The threshold question in this situation is whether it would be reasonable to find that the warnings could function 'effectively' as *Miranda* requires. There is no doubt about the answer. . . . When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' [Citation.] And it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." (*Seibert, supra*, 542 U.S. p. 601.)

Justice Kennedy concurred, reasoning that if the interrogators deliberately employ the two-step strategy, the trial court must suppress post-warning statements unless the interrogators take curative measures to apprise the defendant of his rights. If the two-step method is not deliberate, the post-warning statements are admissible if voluntarily made. (*Seibert, supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.); *see also United States v.*

Williams (9th Cir.2006) 435 F.3d 1148, 1157-58 (*Williams*) [concluding that Justice Kennedy's concurrence in *Seibert* is the court's holding because it is narrowest grounds with which a majority of the court would agree.].)

Deliberateness may be found if "objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." (*Williams, supra*, 435 F.3d at p. 1158.) Objective evidence includes "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." (*Ibid.*) The *Seibert* court noted that a "police strategy adapted to undermine the *Miranda* warnings" (*Seibert, supra*, 542 U.S. at p. 616) will rarely be candidly admitted by police officers; therefore, the focus is on facts apart from intent that show the question-first tactic at work. (*Id.*, at p. 616, fn. 6.)

When the court finds no deliberateness, the admissibility of postwarning statements should be governed by the principles stated in *Elstad, supra*, 470 U.S. 298, 301, which held that "although a *Miranda* violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because 'neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression.'" (*Elstad, supra*, at p. 308; *Seibert, supra*, 542 U.S. at pp. 620, 622 (conc. opn. of Kennedy, J.).)

This case is clearly distinguishable from *Seibert*. Detective Moritz testified that while interviewing Moreno he did not consider Moreno was the perpetrator until he confessed. Accordingly, there is no subjective evidence of deliberateness. As to the

objective factors that might indicate deliberateness, the two interviews were conducted by the same police officer. However, this factor is not dispositive. The first interview was not complete in the sense that it can be said that "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid." (*Seibert, supra*, 542 U.S. at p 616.) Rather, Moreno had steadfastly maintained his innocence throughout the first interview; consequently, when the second interview started Moreno was free to continue insisting — as he initially did — that he was not the shooter. But he subsequently voluntarily elected to change his story and admit his involvement.

The six hour-break between interviews reflects an absence of deliberateness and broke any sense of continuity between the two interviews. "[A] substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." (*Seibert* at p. 622 (conc. opn. of Kennedy, J.); accord, *United States v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [finding that a four-hour delay between statements indicated a lack of deliberateness].) Moreover, at the end of the first interview, Detective Moritz advised Moreno that during the break he would retrieve the gun used in the homicide and seek to locate and interview Gonzales and Long.

The second interview took place in a different police station interview room that was 30 feet away from the room where the first interview was conducted. Detective Moritz immediately *Mirandized* Moreno and prefaced the interview by referring not to Moreno's prior statements, but to new information he had obtained in his recent

interviews with Gonzales and Long. Under the totality of the circumstances, we conclude that the police did not engage in a deliberate two-interview strategy that undermined the effectiveness of the *Miranda* warnings. Further, on appeal, Moreno does not claim — and we find no indicia — that police obtained his confession by physical or psychological coercion. Accordingly, under the holdings of *Seibert* and *Elstad*, Moreno's statements made in the second interview were voluntary and admissible. Having addressed the *Miranda* issues on the merits, we need not address Moreno's ineffective assistance of counsel claim.

III. *The Abstract of Judgment Must be Amended*

As the People point out, with no opposition from Moreno, the abstract of judgment must be amended to accurately reflect the sentence. Specifically, the abstract does not unambiguously show that the trial court sentenced Moreno to 95 years to life plus two life terms; also, the total of 843 days presentence custody credits is impermissibly recorded once each on the determinate and indeterminate abstracts of judgment. (§2900.5, subd. (b); *People v. Cooksey*, *supra*, 95 Cal.App.4th at pp. 1414-1415.)

DISPOSITION

The judgment is modified to reflect that Moreno is sentenced to 95 years to life plus two life terms, and entitled to receive custody credits for a total of 843 days. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect such modifications and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.